

1
2
3
4
5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 JOSIAH TUTTLE,

9 Plaintiff,

10 v.

11 AT&T MOBILITY, et al.,

12 Defendants.

CASE NO. C18-5179 BHS

ORDER DISMISSING
PLAINTIFF'S COMPLAINT
WITHOUT PREJUDICE,
GRANTING PLAINTIFF LEAVE
TO AMEND, AND RENOTING
PLAINTIFF'S MOTION TO
PROCEED *IN FORMA PAUPERIS*

13 This matter comes before the Court on Plaintiff Josiah Tuttle's ("Tuttle") motion
14 to proceed *in forma pauperis* (Dkt. 1) and proposed complaint (Dkt. 1-1).

15 On March 8, 2018, Tuttle filed the instant motion and proposed complaint. Tuttle
16 alleges that his former employer, Defendant AT&T Mobility ("AT&T"), failed to rehire
17 him after he was voluntarily terminated due to a disability. *Id.* at 6. Tuttle asserts claims
18 under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 to
19 12213, and briefly mentions the Employee Retirement Income Security Act ("ERISA").
20 *Id.*

21 The district court may permit indigent litigants to proceed *in forma pauperis* upon
22 completion of a proper affidavit of indigency. *See* 28 U.S.C. § 1915(a); W.D. Wash.

1 Local Rules LCR 3(b). However, the “privilege of pleading *in forma pauperis* . . . in
2 civil actions for damages should be allowed only in exceptional circumstances.” *Wilborn*
3 *v. Escalderon*, 789 F.2d 1328 (9th Cir. 1986). The court has broad discretion in denying
4 an application to proceed *in forma pauperis*. *Weller v. Dickson*, 314 F.2d 598 (9th Cir.
5 1963), *cert. denied* 375 U.S. 845 (1963).

6 However, even if a party satisfies the financial requirements for eligibility to
7 proceed *in forma pauperis*, the Court’s review of the application and underlying
8 complaint is not complete. Under the *in forma pauperis* statute, the Court must dismiss
9 the case *sua sponte* if it determines at any time that (1) the allegation of poverty is untrue,
10 (2) the action is frivolous or malicious, (3) the complaint fails to state a viable claim, or
11 (3) the action seeks monetary relief against an immune defendant. 28 U.S.C. §
12 1915(e)(2).

13 In this case, Tuttle appears to assert a claim that is barred, or at least unexhausted,
14 and fails to state another viable claim. “[U]nder Title I of the ADA, a person first must
15 file a charge of discrimination with the federal Equal Employment Opportunity
16 Commission (EEOC) or with a state or local agency able to grant relief from the unlawful
17 employment practice.” *Zimmerman v. State of Or. Dep’t of Justice*, 983 F. Supp. 1327,
18 1328 (D. Or. 1997), *aff’d sub nom. Zimmerman v. Oregon Dep’t of Justice*, 170 F.3d
19 1169 (9th Cir. 1999). The filing deadline acts as a statute of limitations and failure to file
20 a timely charge bars a subsequent action in federal court. *Delaware State College v.*
21 *Ricks*, 449 U.S. 250, 256–57 (1980). Tuttle asserts that by the time he realized that he
22 needed to file an EEOC claim, it was too late. Dkt. 1-2 at 2. Thus, Tuttle admits that this

1 claim is either unexhausted or time-barred. The Court dismisses the claim without
2 prejudice and with leave to file an amended complaint. In any amended complaint, Tuttle
3 shall provide additional facts regarding his EEOC claim.

4 Second, Tuttle briefly mentions ERISA without providing sufficient facts to state a
5 viable claim against AT&T. Thus, the Court dismisses this claim without prejudice and
6 with leave to amend. In any amended complaint, Tuttle shall sufficiently explain the
7 basis for an ERISA-based claim. The Clerk shall renote Tuttle's motion to proceed *in*
8 *forma pauperis* for consideration on the Court's April 20, 2018, calendar. Tuttle shall
9 file an amended complaint consistent with this order no later than April 20, 2018. The
10 Clerk shall close this matter, without further order of the Court, if Tuttle fails to file an
11 amended complaint or otherwise respond.

12 **IT IS SO ORDERED.**

13 Dated this 12th day of March, 2018.

14
15 

16 BENJAMIN H. SETTLE
17 United States District Judge
18
19
20
21
22